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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION
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12 JESUS ADAM LEON,

13 Petitioner,

14 v.

15 CHARLES CALLAHAN, Warden,

16 Respondent.
17

No. SA CV 18-903-DMG (PLA)

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS, AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

18 On March 4, 2019, the United States Magistrate Judge issued a Report and
19 Recommendation ("R&R"), recommending that respondent's Motion to Dismiss be granted, and
20 that petitioner's First Amended Petition for Writ of Habeas Corpus be denied and dismissed with
21 prejudice as untimely. [Doc. # 22.] On June 26, 2019, petitioner filed Objections to the R&R.
22 [Doc. # 29.]

23 The bulk of the arguments that petitioner makes in his Objections is sufficiently addressed
24 in the Magistrate Judge's R&R. A few of his arguments, however, warrant further discussion. For
25 example, petitioner contends that the Magistrate Judge erred in finding that petitioner was not
26 entitled to statutory tolling for any period during which his third state habeas petition was pending
27 in the California Supreme Court. [Doc. # 29 at 9.] Petitioner believes that the Magistrate Judge
28 found that petitioner was entitled to no statutory tolling during that period because "the [68] day

1 gap between the court of appeal's denial [of his second state habeas petition] and petitioner's
2 subsequent filing of his habeas petition in the [California] Supreme Court was unreasonable." Id.
3 This finding was erroneous, according to petitioner, for several reasons. First, petitioner notes that
4 the 68-day gap between the denial of his second state habeas petition and the filing of his third
5 state habeas petition was only eight days "over the [36] day 'benchmark' established by the United
6 State Supreme Court. . . ." Id. Second, petitioner maintains that the eight-day delay in excess of
7 that benchmark was justified by the fact that petitioner had no access to his property "for [eight]
8 days while [he] was being transferred" between prisons. Id. at 10. Third, petitioner asserts that
9 the Magistrate Judge's finding with respect to the 68-day delay conflicts with the Magistrate
10 Judge's finding regarding petitioner's first state habeas petition. Id. at 13. Specifically, petitioner
11 asserts that the Magistrate Judge found that petitioner's first state habeas petition was timely,
12 even though it was not filed until 363 days of the AEDPA one-year limitations period had elapsed.
13 Id. Citing this finding, petitioner concludes that the Magistrate Judge effectively was precluded
14 from finding that the much shorter 68-day delay between the denial of petitioner's second state
15 habeas and the filing of his third state habeas petition was unreasonable. Id.

16 These arguments are meritless because they are premised on a flawed understanding of
17 the Magistrate Judge's R&R. Contrary to petitioner's assertions, the Magistrate Judge made no
18 findings as to the timeliness of either petitioner's first state habeas petition or his third state habeas
19 petition. Rather, the Magistrate Judge merely set forth the findings of the state courts. As to
20 petitioner's first state habeas petition, the state superior court did not reject it as untimely, but
21 instead rejected it in a reasoned opinion. See Lodgment No. 6. As to petitioner's third state
22 habeas petition, the California Supreme Court rejected that petition as untimely. Although the
23 Magistrate Judge analyzed the impact of the state courts' findings in determining whether and to
24 what extent petitioner was entitled to statutory tolling, the Magistrate Judge made no independent
25 findings as to whether any of petitioner's state court habeas petitions was timely or not.

26 Moreover, there is no merit to petitioner's argument that the Magistrate Judge based his
27 conclusions on the 68-day delay between the denial of petitioner's second state habeas petition
28 and the filing of his third state habeas petition. This argument is, no doubt, premised on the United

1 States Supreme Court's instruction to lower courts about what is "reasonable" in terms of the
2 intervals between the denial of a petition in one state court and the filing of a subsequent petition
3 in a higher state court for purposes of gap tolling. Because California has never definitively stated
4 what is "reasonable" in terms of such intervals, the Supreme Court has instructed lower courts to
5 assume that, for purposes of gap tolling, California law does not differ significantly from other
6 states with determinate timeliness rules. Evans v. Chavis, 546 U.S. 189, 198, 126 S. Ct. 846, 163
7 L. Ed. 2d 684 (2006). Therefore, unjustified filing delays longer than 30 to 60 days are
8 unreasonable. Chaffer v. Proper, 592 F.3d 1046, 1048 (9th Cir. 2010) (per curiam). Accordingly,
9 a petitioner is entitled to no statutory tolling for such delays, although the petitioner is entitled to
10 statutory tolling while the petition is actually pending -- assuming that the petition was properly filed
11 and that the AEDPA limitations period had not run before the petition was filed. See id.

12 This law, however, is inapplicable here because the Magistrate Judge did not find that the
13 68-day delay between the denial of petitioner's second state habeas petition and the filing of his
14 third state habeas petition entitled petitioner to no gap tolling for that period. Rather, relying on
15 the California Supreme Court's order rejecting petitioner's third state habeas petition as untimely,
16 the Magistrate Judge correctly concluded that petitioner was not entitled to statutory tolling for any
17 period during which the third state habeas petition was pending because that petition was not
18 properly filed. See 28 U.S.C. § 2244(d)(2); Bonner v. Carey, 425 F.3d 1145, 1148-49 (9th Cir.
19 2005), amended, 439 F.3d 993 (9th Cir.) (holding that state court's untimeliness determination
20 renders petition not "properly filed" within meaning of 28 U.S.C. section 2244(d)(2)). Although
21 petitioner suggests that the California Supreme Court's timeliness finding amounted to an
22 unreasonable application of state law (see Doc. # 29 at 14), this Court is in no position to question
23 the California Supreme Court's application of California law.

24 Petitioner also faults the Magistrate Judge for finding that, at all relevant times, or at least
25 no later than September 27, 2016, petitioner had a copy of his trial record. [Doc. # 29 at 5-6.]
26 According to petitioner, this finding was incompatible with the Magistrate Judge's acknowledgment
27 that Legal Insights identified documents that it had in its possession that "were not in the trial
28 record that petitioner had." [Doc. # 22 at 4.] However, this reference pertained to only a handful

1 of documents, some of which would not have been part of petitioner's trial record, but rather
2 gathered or generated after his conviction.¹ [See Doc. # 21-2 at 176-77.] Moreover, to the extent
3 that some of the documents were part of the trial record, petitioner fails to explain how any of
4 those documents was necessary to support any of the claims for relief that he has asserted in this
5 action. Further, to the extent that petitioner lacked copies of those documents, there is no reason
6 to believe that Legal Insights was responsible.² In any event, as the Magistrate Judge noted,
7 petitioner's repeated citations to the trial record in his correspondence to Legal Insights shows
8 that, at all relevant times, he possessed a copy of the relevant portions of the trial record. [See,
9 e.g., Doc. # 22 at 4, 13-14, 15.]

10 Finally, petitioner contends that, contrary to the Magistrate Judge's findings, petitioner "had
11 no knowledge of the need to file a protective habeas petition in the federal court prior to filing his
12 habeas petition in the [California] Supreme Court." [Doc. # 29 at 17-18.] This contention is
13 meritless because petitioner was explicitly advised to file a protective federal habeas petition
14 before he filed any of his state habeas petitions. What is more, he was advised to do so while
15 there was ample time remaining on the one-year AEDPA limitations period. [See Doc. # 12-2 at
16 168.] Although petitioner maintains that "he did not see the necessity to consume the resources
17 of the federal court by filing a protective petition prematurely," he ignores the fact that all protective
18 petitions are filed "prematurely." Indeed, that is the entire point of filing a protective petition. See

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21 ¹ The Magistrate Judge noted this fact in his R&R:

22 [P]etitioner maintains that Legal Insights committed misconduct by refusing to
23 comply with his request to return his property. Although petitioner, in his Opposition,
24 does not identify the specific property to which he is referring, a review of the
25 correspondence between petitioner and Legal Insights appears to show that the
26 property at issue, by and large, consists of files generated or gathered by Legal
27 Insights regarding a proposed collateral attack to petitioner's conviction and
28 sentence.

(Docket No. 22 at 11).

² The Court notes that Legal Insights identified an enormous amount of documents pertaining
to petitioner's case that it had in its files. (See Docket No. 21-2 at 179-81). Of those documents,
petitioner requested only eight. (See id. at 177-78).

1 Pace v. DiGuglielmo, 544 U.S. 408, 416, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005) (explaining
2 that option of filing protective petition is designed to avoid “predicament” of “a ‘petitioner trying in
3 good faith to exhaust state remedies may litigate in state court for years only to find out at the end
4 that he was never properly filed,’ and thus that his federal habeas petition is time barred”). What
5 is more, the fact that petitioner eventually filed a protective petition, albeit too late, shows that he
6 could have done so at any point.

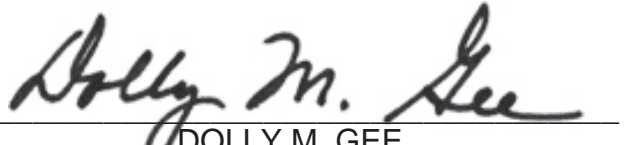
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8 **CONCLUSION**

9 Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the First
10 Amended Petition, the other records on file herein, the Magistrate Judge’s Report and
11 Recommendation, and petitioner’s Objections to the Report and Recommendation. The Court has
12 engaged in a de novo review of those portions of the Report and Recommendation to which
13 objections have been made. The Court concurs with and accepts the findings and conclusions
14 of the Magistrate Judge.

15 **ACCORDINGLY, IT IS ORDERED:**

- 16 1. The Report and Recommendation is accepted.
17 2. Respondent’s Motion to Dismiss is granted.
18 3. Judgment shall be entered denying and dismissing the First Amended Petition with
19 prejudice.
20 4. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

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22 DATED: December 26, 2019

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24 DOLLY M. GEE
25 UNITED STATES DISTRICT JUDGE
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